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COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

NANCY and CLAYBURN SMITH, Plaintiffs/Appellants, v. BENSON HOSPITAL, an Arizona corporation; ANDREW W. MAYBERRY, M.D., P.C., an Arizona corporation; and ANDREW W. MAYBERRY, M.D. and SHEILA MAYBERRY, husband and wife, Defendants/Appellees.	2 CA-CV 2009-0132 DEPARTMENT A MEMORANDUM DECISION Not for Publication Rule 28, Rules of Civil Appellate Procedure

APPEAL FROM THE SUPERIOR COURT OF COCHISE COUNTY

Cause No. CV-200800014

Honorable Charles A. Irwin, Judge

AFFIRMED

Rusing & Lopez, P.L.L.C.
By Catherine M. Woods
Tucson
Attorneys for Plaintiffs/Appellants

Lewis Brisbois Bisgaard & Smith
By James K. Kloss and Jodi L. Skeel
Phoenix
Attorneys for Defendant/Appellee
Benson Hospital

Smith Law Group
By Christopher J. Smith, E. Hardy Smith,
and Kathleen L. Leary Tucson
Attorneys for Defendants/Appellees Mayberry

H O W A R D, Chief Judge.

¶1 Appellants Nancy and Clayburn Smith (collectively "Smith") sued appellees Benson Hospital (Benson), Andrew Mayberry, M.D., P.C., and Andrew Mayberry and his wife (collectively "Mayberry") for medical malpractice. Following a jury trial, judgment was entered in favor of appellees. Smith raises numerous arguments on appeal, none of which merits reversal. Therefore, we affirm.

Factual and Procedural Background

¶2 We view the facts in the light most favorable to upholding the jury's verdict. *Styles v. Ceranski*, 185 Ariz. 448, 450, 916 P.2d 1164, 1166 (App. 1996). Nancy Smith went to Benson Hospital on March 31, 2006, complaining of abdominal pain, among other things. Mayberry was her treating physician. She spent the night at the hospital and was discharged the following day. On April 3, Smith returned to Benson Hospital's emergency room complaining of leg pain and was transferred to Tucson Medical Center (TMC). While at TMC, Dr. Michael Lavor diagnosed Smith with a blood clot in her leg and performed surgery the same day to remove it. Smith underwent many additional surgeries as a result of the clot. Smith later sued Benson Hospital and Mayberry alleging that negligent treatment during her first visit to the hospital had caused

her injuries. A jury found in favor of Benson and Mayberry. Smith then filed a motion for a new trial, which the trial court denied. This appeal followed.

Testimony about Lavor's Treatment

¶3 Smith argues, under several different theories, that the trial court erred by allowing Benson and Mayberry to introduce evidence that Lavor had "rendered 'improper' medical treatment" and that his treatment, not theirs, had caused Smith's injuries. We review a trial court's ruling on evidentiary objections and discovery violations for prejudicial abuse of discretion. *Zimmerman v. Shakman*, 204 Ariz. 231, ¶¶ 10, 12, 62 P.3d 976, 980 (App. 2003). Smith asserts, however, that our review should be de novo because "the evidentiary ruling [was] predicated on a question of law." However, as more thoroughly discussed below, she does not raise any such issues here. We address each basis for Smith's argument in turn.

Rule 26(b)(5), Arizona Rules of Civil Procedure

¶4 Smith first contends that the trial court should not have allowed Benson and Mayberry to present evidence about Lavor's treatment as a possible cause of her injuries because they did not disclose Lavor as a nonparty at fault in accordance with Rule 26(b)(5). That rule allows "[a]ny party" to allege "that a person or entity not a party to the action was wholly or partially at fault in causing any personal injury, property damage or wrongful death for which damages are sought in the action." And the term "fault" has specific legal significance. *See* A.R.S. § 12-2506(F)(2). Rule 26(b)(5) is only implicated when defendants want the jury to consider such a nonparty in apportioning fault. *See Rosner v. Denim & Diamonds, Inc.*, 188 Ariz. 431, 433, 937 P.2d 353, 355

(App. 1996) (the effect of A.R.S. § 12-2506, which is implemented by Rule 26(b)(5), is to allow jury to apportion fault among all tortfeasors); *see also* Ariz. R. Civ. P. 26(b)(5) (citing comparative fault statute § 12-2506). Because Benson and Mayberry did not request that the jury apportion any fault to Lavor in awarding damages, we find no abuse of discretion on this ground.

¶5 At oral argument, Smith claimed both Rule 26(b)(5) and § 12-2506 were created for the benefit of plaintiffs as a kind of "safety net," citing *LyphoMed, Inc. v. Superior Court*, 172 Ariz. 423, 837 P.2d 1158 (App. 1992), and *Soto v. Brinkerhoff*, 183 Ariz. 333, 903 P.2d 641 (App. 1995). However, while both of these cases state that the rule is meant to ensure that the plaintiff knows the identity of all parties at fault, the context for providing this information is apportionment of fault among the responsible parties. *See Soto*, 183 Ariz. at 335-37, 903 P.2d at 643-45; *LyphoMed*, 172 Ariz. at 427-28, 837 P.2d at 1162-63. These cases do not require exclusion of evidence of a nonparty's treatment and causation, even when apportionment of fault is not sought, as Smith asserted. Furthermore, the sanction in Rule 26(b)(5) is limited to preclusion of the allocation of fault, and Benson and Mayberry did not request or receive any apportionment of fault to Lavor.

Rules 26.1 and 37(c), Arizona Rules of Civil Procedure

¶6 Smith further asserts that Benson and Mayberry did not timely disclose, in accordance with Rule 26.1, their intent to argue that Lavor was the cause of her injuries and that, as a consequence, the trial court should have precluded the evidence pursuant to Rule 37(c). She claims that she was not aware of their intent until six weeks before the

trial began, when, in March 2009, the defense causation expert Dr. Eric Berens testified at his deposition that Lavor's treatment of Smith was negligent.

¶7 Rule 26.1(a) requires prompt disclosure of, inter alia, legal theories of the claims and defenses and the subject matter about which expert witnesses will testify. Information must be disclosed more than sixty days prior to trial unless the party seeking to use the information has been granted additional time by the court. Ariz. R. Civ. P. 26.1(b)(2). If the court does not grant leave for late disclosure, the offending party is generally not allowed to present the evidence. Ariz. R. Civ. P. 37(c).

¶8 Benson and Mayberry initially disclosed Berens as an expert witness in a July 2008 disclosure statement, and they specified he would be a causation expert testifying about, inter alia, "[Smith]'s course of events at TMC." They filed a supplemental disclosure statement in November 2008, more than fourth months before trial, stating that Berens would testify about the care that Smith received from Lavor. This disclosure statement included several of Berens's criticisms of Lavor's treatment, including 1) Smith's "subsequent problems in her left leg resulted from [an injury sustained in the surgery Lavor performed and] . . . being discharged on premphase,"[1] 2) an explanation of what Lavor did, including inserting a catheter into the artery, followed by the assertion that "[t]he catheter is not supposed to go into the artery" and 3) "Regarding Dr. Lavor's treatment, . . . an angiogram should have been done to determine if any clot had been left behind."

[1]Premphase is a drug that can increase the risk of clots.

¶9 But Smith argues the disclosure was not sufficient, stating that it did not clearly criticize Lavor's treatment because, in part, their intent was not explicit and the word "criticism" was never used. We reject the notion that such "magic words" are required, especially in light of language demonstrating Berens's clear disapproval of Lavor's treatment of Smith. Because the disclosure included information that Berens would be testifying that Lavor's treatment was the cause of Smith's injuries and because it was filed more than sixty days prior to trial, the trial court could have correctly found that Smith had sufficient notice of Berens's opinions about causation. *See* Ariz. R. Civ. P. 26.1(b).

¶10 Smith also states that Berens's testimony should have been precluded because the disclosure did not include language identifying him as an expert on the standard of care for vascular surgeons. At Berens's deposition, he testified that he believed Lavor had been negligent, that is, that Lavor's treatment not only was the cause of Smith's injuries but also fell below the applicable standard of care. Ruling on Smith's subsequent objection to this evidence in a motion in limine, the trial court concluded that Berens could testify at trial that Lavor had caused the injuries but that he could not testify about the applicable standard of care; only causation testimony was allowed. The trial court revisited this ruling before opening statements but did not change its decision. The court stated it would not allow Berens to testify that Lavor had been "negligent," or, more specifically, had "fallen below the standard of care." But the court ruled that Berens could testify that Lavor's treatment of Smith had been "improper" and had caused

Smith's injuries. Thus, the standard-of-care evidence that Smith argues should have been precluded was, in fact, precluded.

¶11 Smith maintains that Berens's testimony about Lavor's "improper" treatment of her should not have been allowed. But causation was the crux of the testimony, regardless of whether Lavor's treatment was proper or improper. So in light of the adequate disclosure, the trial court did not abuse its discretion in admitting Berens's testimony. And to the extent Smith argues that standard-of-care evidence was improperly admitted at trial in violation of the court's pre-trial ruling, she has not demonstrated that she objected to its admission; consequently, she forfeited any such argument. *See City of Tempe v. Fleming*, 168 Ariz. 454, 456, 815 P.2d 1, 3 (App. 1991) ("arguments not made at the trial court cannot be asserted on appeal").

¶12 In her reply brief, Smith asserts that if we were to find the trial court did not err, we would be endorsing "trial by ambush" and "'hide the pea' tactics." However, the November disclosure statement clearly communicated Benson's and Mayberry's intent to present evidence about Lavor's treatment of Smith as the cause of her injuries. And we have determined that Benson and Mayberry did not violate Rule 26(b)(5), on which Smith relies in claiming they effectuated an ambush. Furthermore, she neither requested a continuance nor asked permission to add an expert witness at any point in the proceedings. Thus, we reject the notion that we are endorsing such tactics by affirming the jury's verdict and the judgment entered on that verdict.

Rules 402 and 403, Arizona Rules of Evidence

¶13 Smith finally claims that Berens's testimony about Lavor's treatment should have been precluded because it was irrelevant and unduly prejudicial. Relevant evidence is that "having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Ariz. R. Evid. 401. And relevant evidence is generally admissible, Ariz. R. Evid. 402, subject to limitations such as the one set forth in Rule 403, Ariz. R. Evid., which Smith cites, permitting a trial court to exclude relevant evidence if its prejudicial effect outweighs its probative value. But "'[r]elevant evidence generally will adversely affect the party against whom it is offered, [and] that is not the type of prejudice of which Rule 403 speaks.'" *Henry ex rel. Estate of Wilson v. HealthPartners of S. Ariz.*, 203 Ariz. 393, ¶ 18, 55 P.3d 87, 92 (App. 2002), *quoting Yauch v. S. Pac. Transp. Co.*, 198 Ariz. 394, ¶ 28, 10 P.3d 1181, 1191 (App. 2000). Rule 403 is meant to preclude evidence that "'has an undue tendency to suggest decision on an improper basis, such as emotion, sympathy, or horror.'" *Id.*, *quoting State v. Mott*, 187 Ariz. 536, 545, 931 P.2d 1046, 1055 (1997).

¶14 Smith first argues the evidence "regarding Dr. Lavor's negligence and fault" was irrelevant and unduly prejudicial. But, as we explained above, the court actually precluded this evidence when it ruled on Smith's motion in limine. The court concluded that evidence of the standard of care was not admissible and that Benson and Mayberry could only present evidence of causation. Thus, her argument is moot with respect to this evidence.

¶15 Additionally, Smith appears to argue evidence about Lavor's treatment of her was unduly prejudicial and not relevant to the issue of causation. Smith asserts that the evidence was irrelevant because the "only relevant issues for the jury to determine were whether Appellee Mayberry and/or Appellee Benson Hospital were negligent and, if so, [whether] their negligence [was] a cause of [Smith]'s damages." However, because part of the jury's task was to determine whether the actions or omissions of Benson and Mayberry were the cause of Smith's damages, *see* A.R.S. § 12-563, evidence that Lavor's treatment may have been the cause of these injuries was indeed relevant, *see* Ariz. R. Evid. 401. Furthermore, evidence that someone other than Benson and Mayberry may have caused the injuries cannot be unduly prejudicial to Smith. *See Henry ex rel. Estate of Wilson*, 203 Ariz. 393, ¶ 18, 55 P.3d at 92 (Rule 403 meant to preclude evidence that might encourage jury to decide on improper, perhaps emotional, basis). Consequently, the trial court did not abuse its discretion in allowing Benson and Mayberry to present evidence that Lavor's treatment caused Smith's injuries.

Jury Instructions

¶16 Smith next argues that the trial court erred by not giving two requested jury instructions in order "to mitigate against the unfair prejudice that had occurred throughout the trial as a result of the evidence, testimony, and argument presented by [Benson and Mayberry] on the issue of 'improper' treatment and the alleged fault on the part of Dr. Lavor." "'We review a trial court's denial of a requested jury instruction for abuse of discretion.'" *Strawberry Water Co. v. Paulsen*, 220 Ariz. 401, ¶ 21, 207 P.3d

654, 662 (App. 2008), *quoting State v. Rosas-Hernandez*, 202 Ariz. 212, ¶ 31, 42 P.3d 1177, 1185 (App. 2002).

¶17 "The court must give a proposed jury instruction 'if: (1) the evidence presented supports the instruction, (2) the instruction is proper under the law, and (3) the instruction pertains to an important issue, and the gist of the instruction is not given in any other instructions.'" *Id.* ¶ 22, *quoting DeMontiney v. Desert Manor Convalescent Ctr. Inc.*, 144 Ariz. 6, 10, 695 P.2d 255, 259 (1985). And "jury instructions are [reviewed] as a whole with an eye toward determining whether the jury was given the proper rules of law to apply in arriving at its decision." *Thompson v. Better-Bilt Aluminum Prods. Co.*, 187 Ariz. 121, 126, 927 P.2d 781, 786 (App. 1996). A jury verdict will not be disturbed "unless there is substantial doubt as to whether the jury was properly guided in its deliberations." *Id.* But if the jury finds no liability on the part of the defendants, an erroneous instruction on damages is harmless. *Medlyn v. Kimble*, 106 Ariz. 66, 68, 470 P.2d 679, 681 (1970).

¶18 The first instruction Smith requested pertained to damages suffered during subsequent treatment, based on the Restatement (Second) of Torts § 457 (1965). The instruction would have informed the jury that, should it find Benson, Mayberry, or both liable for Smith's injuries, the liable party or parties would also be responsible for any subsequent harm suffered in the treatment of those injuries, regardless of whether that treatment had been proper or negligent.

¶19 The jury was instructed on the relevant standards of care. And the instructions further explained that if a failure to meet the appropriate standard of care was

a cause of the injuries, the party concerned was liable for at least part of those injuries. This instruction provided the jury with guidance to assess liability to either Mayberry or Benson or both based on Smith's claim that their negligence arose from a delay in treatment. Additionally, the court informed the jury that, should it find any of the defendants liable, it must then decide what damages would be required to compensate Smith for her injuries. But the jury did not assess any damages at all. So while none of the instructions addressed liability for subsequent harm, the jury necessarily did not reach this issue because it did not find Benson and Mayberry liable. Thus, any error in not giving the requested instruction would have been harmless. *See Medlyn*, 106 Ariz. at 68, 470 P.2d at 681.

¶20 Smith also requested a "curative instruction" that the jury "should not consider fault on [Dr. Lavor's] part as a way to reduce damages or apportion fault." However, the trial court actually precluded evidence of Lavor's fault by precluding testimony on the appropriate standard of care, and we have already concluded that the court did not err by admitting testimony of causation. The jury was instructed to consider the fault of Mayberry and Benson. The jury was not instructed to apportion any fault to Lavor, so there was no mention of him on the verdict form. Thus, there is no error here to "cure." Furthermore, because, in accordance with the trial court's pre-trial ruling, there was no evidence presented at trial to support an instruction on Lavor's fault, we cannot conclude that the court abused its discretion by declining to give it. *See Strawberry Water Co.*, 220 Ariz. 401, ¶ 21, 207 P.3d at 662.

Motion for New Trial and Evidence of Damages

¶21 We last address Smith's argument that the trial court erred by denying her motion for a new trial. Her motion, however, was based on the same issues she raises on appeal, and we have concluded that there was no reversible error relating to those issues. Thus, her assertion that she should have been granted a new trial fails for the reasons discussed above. Smith also requests that, should we grant a new trial, we address an issue regarding proof of damages. Because we affirm the trial court's decision, we need not address this question.

Conclusion

¶22 For the foregoing reasons, we affirm the judgment and the trial court's denial of Smith's motion for new trial.

/s/ Joseph W. Howard
JOSEPH W. HOWARD, Chief Judge

CONCURRING:

/s/ Philip G. Espinosa
PHILIP G. ESPINOSA, Presiding Judge

/s/ Virginia C. Kelly
VIRGINIA C. KELLY, Judge